95-911

Supreme Court, U.S.
FILED
DEC 7 1995
CLERK

No. 95-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JONATHAN W. CHUDSON,

Petitioner,

v.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR A WRIT OF CERTIORARI

JONATHAN W. CHUDSON
4 PASTURE BROOK COURT
POTOMAC, MD 20854
(301) 340-7198

Petitioner Pro Se

61pp

QUESTIONS PRESENTED

1. Should a Federal job applicant, who argues that his status on a Federal agency's reemployment priority list was a "sham", in violation of his rights pursuant to 5 U.S.C. § 1302 and 5 C.F.R. § 330.201 *et seq*,. because the hiring Federal agency, having admitted that applicant was qualified for the available position, hired another individual not having reemployment priority status on the basis that the applicant would cause the agency undue interruption, be allowed to present evidence that the selected individual was not qualified for the position in question.

2. Are a Federal job applicant's reemployment priority rights violated when the Federal agency, having admitted applicant is qualified for an available position, subsequently alters the job qualifications and uses these alterations as a basis for justifying the selection of an acquaintance of the selecting official with no reemployment priority rights, no veterans preference, and no knowledge of the agency or its programs over an applicant with reemployment priority rights, veterans preference, and extensive experience with the agency in the same grade and job series as the available position.

LIST OF PARTIES

The parties to this proceeding are listed in the caption.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Jonathan W. Chudson, respectfully requests that this Court issue a writ of certiorari to review the judgement of the United States Court of Appeals for the Federal Circuit entered in this action.

OPINIONS BELOW

The second decision of the Court of Appeals is not reported, and is reproduced at Pet. App. A, pp. 1a-9a, *infra*. The second final order of the Merit Systems Protection Board is reproduced at Pet. App. C, pp. 11a, *infra*. The second initial decision of the Merit Systems Protection Board is reproduced at Pet. App. D, pp. 12a-18a, *infra*. The decision of the Court of Appeals to vacant and remand the first decision of the Merit Systems Protection Board is reported at 17 F.3d 380, and is reproduced at Pet. App. E, pp. 19a-31a, *infra*. The first order of the Merit Systems Protection Board is reproduced at Pet. App. F, pp. 32a, *infra*. The first initial decision of the Merit Systems Protection Board is reproduced at Pet. App. G, pp. 33a-44a, *infra*.

JURISDICTION

The opinion of the United States Court of Appeals for the Federal Circuit was issued on July, 14, 1995. A timely petition for rehearing was denied by that court on September 8, 1995 (Pet. App. B, pp. 10a, infra).

STATEMENT

1. Mr. Chudson Leaves His Position At The Environmental Protection Agency With Reemployment Priority Rights.

On September 26, 1989, Petitioner Mr. Chudson reached a settlement agreement in his whistleblower action which provided among other things that Mr. Chudson would be placed on special detail from the Environmental Protection Agency (EPA) Inspector General's (IG) office to another part of EPA, at the end of which Mr. Chudson would be placed on the Reemployment Priority List and OPM's Displaced Persons program as provided for by 5 U.S.C. § 1302 and 5 C.F.R. § 330.201.[1] On October 5, 1990, Mr. Chudson's EPA employment was ended.

2. The Environmental Protection Agency Fails To Reemploy Mr. Chudson Despite Its Agreement To Do So.

Mr. Chudson was eligible for appointment to several positions on the Re-employment Priority List but was not selected for the positions, including vacancy announcements withdrawn after his name appeared on the Re-Employment Priority List.

During 1991 Mr. Chudson applied for positions in the EPA Office of Criminal Enforcement. What happened next was Mr. Chudson's non-selection for a position for which he was uniquely suited by virtue of some six years of EPA experience,

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[1] Settlement Agreement in Chudson v. EPA, MSPB Docket No. DC04328910477, p. 3, ¶7(5).

as revealed by the list of Agreed Upon Material Facts filed in this action:

On January 28, 1992 Jonathan W. Chudson was interviewed at the EPA for the GM-14 supervisory criminal investigator position in question by Earl E. Devaney and Pasquale Alberico. On February 3, 1992 Earl E. Devaney signed a memorandum to Zandra Kern stating that the hiring of the appellant for the GM-14 supervisory criminal investigator position in question would cause "undue interruption" to the agency and that the Noncompetitive Referral Certificate was being returned without selection. On February 7, 1992 Michael A. Hamlin notified the appellant of his "nonselection" for the GM-14 supervisory criminal investigator position in question. The job qualifications required knowledge of EPA laws. Mr. Chudson had such knowledge, based on some six years of work at EPA. The successful candidate had no such experience. Applicable Federal regulations concerning hiring from a Reemployment Priority List provide for the appointment, under certain conditions, of an individual who is not on the reemployment priority list. 5 C.F.R. § 330.207(d) states:

> **(d) Exceptions.** An agency may make an exception to this subpart and appoint an individual who is not on the Reemployment Priority List or has lower standing than others on the Reemployment Priority List only when necessary to obtain an employee for duties that cannot be taken over without undue interruption to the agency by an individual who is on the Reemployment Priority List or has higher standing than the one appointed. The agency shall notify each individual on the Reemployment Priority List who is adversely affected by an appointment under this paragraph of the reasons for the exception and of the right of appeal to

the Merit Systems Protection Board. (Emphasis added)

See Rasmussen v. United States, 543 F.2d 134, 211 Ct.Cl. 260 (1976). EPA did not name so much as one (1) training course that Mr. Chudson lacks, much less one that could not be completed within 90 days.[2] Furthermore, there is no evidence in the record that EPA ever considered the 90 day standard, which has long been the Federal standard for undue interruption, prior to EPA's failure to select Mr. Chudson for the position. There is no proof in the record that Mr. Chudson could not do the required work "within the allowable limits of time and quality." Id.

Clearly, there would have been no undue interruption by putting Mr. Chudson in the position. Ironically, there was most likely an undue interruption by selecting Mr. Catlett - whom Mr. Chudson was not permitted to call as a witness - for the position when he lacked knowledge of the laws administered by the EPA as required by the position description.

3. Mr. Chudson Appeals To The Merit Systems Protection Board And Is Denied All Witnesses At His Hearing.

Mr. Chudson filed a timely appeal of the Environmental Protection Agency's failure to provide him with the reemployment priority rights he was entitled to and specifically asked that he be placed in the position in question. The resulting

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[2] This case is therefore not governed by cases finding "extensive retraining" was needed. See, e.g., Schultz v. Dept. of the Interior, 12 M.S.P.R. 394, 397 (1982); Harris v. Dept. of the Treasury, 5 M.S.P.R. 545 (1981). See also Holtgrewe v. FDIC, 57 M.S.P.R. 307 (May 5, 1993), citing Jackson v. Veterans Administration, 31 M.S.P.R. 135, 137 (1986).

hearing, held on June 4, 1992, can be best described as a cruel and expensive joke played on Mr. Chudson. The Administrative Judge denied every one of Mr. Chudson's witnesses except himself and then ruled, in effect, that he had not provided sufficient evidence to rebut the agency. The initial decision became the final ruling of the Merit Systems Protection Board on November 2, 1992 when the Board denied Mr. Chudson's petition for review in a three sentence order.

The Federal Circuit Vacates and Remands

Mr. Chudson filed a timely petition for review with the United States Court of Appeals for the Federal Circuit. On February 22, 1994 the United States Court of Appeals for the Federal Circuit vacated the decision against Mr. Chudson and remanded the case back to the Merit Systems Protection Board for a new hearing to allow Mr. Chudson to present witnesses to support his position, 17 F.3rd 380 (1994). The court stated "We are convinced the Adıninistrative Judge [Administrative Judge] abused her discretion in excluding these witnesses" (Pet. App. A, p. 28a, *infra*).

MSPB Again Denies Mr. Chudson's Appeal

On April 22, 1994 a second hearing was held before the same Merit Systems Protection Board Administrative Judge. The Administrative Judge again abused her discretion and violated Mr. Chudson's due process rights by failing to allow any discovery prior to the hearing and severely limiting the effort of Mr. Chudson's counsel to question the witnesses.

On June 27, 1994 the Merit Systems Protection Board issued its second initial Decision, again denying Mr. Chudson's appeal (Pet. App. D, p. 12a, *infra*). This decision became final

on October 27, 1994 when the MSBP denied Mr. Chudson's petition for review with the same boiler plate sentence it used in 1992 (Pet. App. C, p.11a, *infra*). Mr. Chudson timely filed a second petition for review with the United States Court of Appeals for the Federal Circuit.

The Federal Circuit Affirms With a Scathing Dissent.

On July 14, 1995 the United States Court of Appeals for the Federal Circuit affirmed the Merit Systems Protection Board in a 2-1 decision (Chudson v. EPA, 17 F.3d 380). Although the majority held that the Administrative Judge's decision was not unsupported by substantial evidence, a dissenting opinion was issued by Judge Newman that indicated a clear understanding of what happened in this matter.

In a scathing dissent, Judge Newman wrote (Pet. App. A, p. 7a, *infra*)

> I respectfully dissent. Mr. Chudson, in settlement of his whistleblower complaint against the Environmental Protection Agency (EPA), was given two years of placement on EPA's Reemployment Priority List. During that period a position for which he was *qualified* arose. Without posting the position the Director of the office arranged for the transfer of a former colleague, Mr. Catlett, from another agency. Then, upon intervention of a personnel officer Mr. Chudson was told of the position; he applied, was interviewed, and was rejected. The Director, Mr. Devaney, when pressed, gave the only reason permitted by the reemployment priority regulations, 5 C.F.R. §330.201, viz. that

Mr. Chudson's hiring would cause an "undue interruption" to the agency.

From a review of the hearing testimony, it appears that Mr. Chudson had the qualifications that were stated in the position description. Mr. Chudson is described as having "six years of [the same] agency experience in the same grade and series." Although the panel majority now holds that the agency can impose additional requirements, as the administrative judge held, the Office of Criminal Enforcement Director Devaney testified that the position description did describe the position. Indeed, a position description can not be changed sub silentio.

The majority states that it is not relevant whether the person who was personally selected (Mr. Catlett) had superior or even equal qualifications. However, when the reason for denying the statutory priority is "undue interruption," mere must at least be a showing that the selected candidate would not cause the same interruption. To hold otherwise is to convert the "priority" status into a sham.

The administrative judge's refusal to permit the requested witnesses to testify at the first trial, and the inappropriately rigorous restraints on testimony on remand, do not leave an impression of fairness in the administrative process. I would reverse the Board's ruling.

On July 28, 1994 Mr. Chudson filed a timely petition for rehearing with the United States Court of Appeals for the Federal Circuit. On September 8, 1995 the United States Court of Appeals for the Federal Circuit denied the petition for rehearing.

REASONS FOR GRANTING THE WRIT

The position of the United States Court of Appeals for the Federal Circuit effectively invalidates the reemployment priority rights of all laid off Federal employees. This is an issue that is both timely and important to the huge number of Federal employees who are currently and may in the future be subject to a reduction in force as a result of the downsizing of the Federal government that is currently underway. Although not a precedential decision, the decision of the United States Court of Appeals for the Federal Circuit in this case represents the position of that court regarding the rights of Federal employees who lose their jobs through a reduction in force. As such, this Court's review of this Petition will effect all Federal employees. The position of the United States Court of Appeals for the Federal Circuit in this case is that a Federal agency can avoid hiring a qualified individual on its reemployment priority list any time it wants to do so by claiming the "undue interruption" exception even when the hiring of an unqualified individual makes the matter a transparent sham.

In allowing, in effect, the nullification of the Federal reemployment priority rights that were established by the Congress, the United States Court of Appeals for the Federal Circuit has so far departed from the accepted and usual course of judicial proceedings that the Supreme Court must exercise its supervisory power and instruct the United States Court of Appeals for the Federal Circuit to respect the legal rights of Federal employees who have been laid off.

This Petition must be heard by the Court. The word "sham" was used twice in Judge Newman's dissenting opinion and for good reason. The Respondent's nonselection of the Petitioner was a sham. The Merit Systems Protection Board

proceedings that ratified this sham were a Kangaroo Court that repeatedly abused its discretion, deprived the Petitioner of due process and issued arbitrary and capricious decisions that were not supported by any creditable and unbiased, much less substantial, evidence.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JONATHAN W. CHUDSON
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December 7, 1995

Petitioner Pro Se

APPENDIX

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

95-3135

JONATHAN W. CHUDSON,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

DECIDED: July 14, 1995

Before ARCHER, Chief Judge, NEWMAN, and LOURIE, Circuit Judges. LOURIE, Circuit Judge.

DECISION

Jonathan W. Chudson petitions for review of the October 27, 1994 final decision of the Merit Systems Protection Board, Docket No. DC0330920437-M-l, affirming the Environmental Protection Agency's decision not to select Chudson for the position of Supervisory Criminal Investigator.

Because Chudson has not demonstrated any error in the board's decision, we affirm.

DISCUSSION

Chudson was employed with the EPA until October 1990, when he was separated from the service pursuant to a settlement agreement. In accordance with the agreement, Chudson was placed on the EPA's Reemployment Priority List ("RPL"). See 5 C.F.R. § 330.201 (1995). In October 1991, Earl E. Devaney was appointed Director of the Office of Criminal Enforcement at EPA. Following his appointment, he created a new position with the agency, Supervisory Criminal Investigator, GM-14. In December 1991, Devaney asked a former colleague, James M. Catlett, if he would be interested in the job. Catlett was a Supervisory Criminal Investigator with the Department of Treasury's Bureau of Alcohol, Tobacco, and Firearms.

In January 1992, Zandra I. Kern of EPA's personnel office informed Devaney that Chudson was on the agency's RPL and had to be considered before the position could be filled from outside the agency. Devaney then interviewed Cbudson but decided not to hire him. Devaney concluded that Chudson lacked certain critical experience and, accordingly, that the agency would suffer an "undue interruption" if Chudson were placed in the position. See 5 C.F.R. § 330.207(d) (1995) ("An agency may make an exception to this subpart and appoint an individual who is not on the RPL . . . only when necessary to obtain an employee for duties that cannot be taken over without undue interruption to the agency by an individual who is on the RPL . . . ."). Devaney detailed his reasons for not

selecting Chudson in a February 3, 1992 memorandum. The EPA then hired Catlett for the position.

Chudson appealed his nonselection to the board. See 5 C.F.R. § 339.209 (1995). The board affirmed the agency's action. On appeal to this court, however, we held that the board had improperly excluded the testimony of three witnesses: John W. West, Zandra I. Kern, and Thomas T. Sheehan. Chudson v. E.P.A., 17 F.3d 380, 384-85 (Fed. Cir. 1994). We vacated the board's decision and remanded the case to permit Chudson to elicit the testimony of these witnesses.

On remand, Chudson was permitted to call West, Kern, and Sheehan to testify. Neither West nor Kern offered any relevant testimony. Sheehan testified as an expert witness. He stated that, in his opinion, the position was a standard desk officer job and that placing Chudson in the position would not have caused the EPA an undue interruption. At the conclusion of the proceeding, the Administrative Judge ("AJ") found that, contrary to Sheehan's assertion, the position was not a standard desk officer job. The AJ also found that Sheehan's testimony did not rebut the EPA's evidence that selecting Chudson would have caused an undue interruption. The AJ therefore concluded that the agency's decision not to hire Chudson conformed with governing regulations. The AJ's initial decision became the final decision of the board when the board denied Chudson's petition for review. 5 C.F.R. § 1201.113 (1994). This appeal followed.

The scope of our review of a board decision is limited by statute. We must affirm the decision unless it is shown to be (1)

arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1994).

On appeal, Chudson argues that the board applied the wrong legal standard in determining whether his appointment would have caused an undue interruption. Chudson contends that the board considered whether he met the qualifications deemed necessary by Devaney rather than the qualifications listed in the official position description. Chudson asserts, in essence, that the board required him to possess qualifications beyond those listed in the position description. In support of his argument, Chudson relies on an excerpt from the AJ's initial decision:

> Given these position qualifications, nothing in Mr. Sheehan's testimony contradicted Mr. Devaney's prior testimony that the appellant did not have the background and experience necessary to perform the duties of the position without undue interruption. Mr. Sheehan provided no evidence that the appellant had supervisory experience in other than a brief acting capacity, or that he had the policy-making, budget, systems management, personnel, or training experience deemed necessary by Mr. Devaney. Mr. Sheehan provided no persuasive evidence that the background and experience sought by Mr. Devaney for the incumbent of the Supervisory criminal Investigator should not have been necessary. Mr. Sheehan, I conclude, did not rebut the testimony of Mr. Devaney that the appellant's selection

> would have been an undue interruption (emphasis added)

Although the highlighted portion of the analysis refers to the qualifications deemed necessary by Devaney, the preceding sentence states that, given the position qualifications, Chudson lacked the background and experience needed to perform the duties of the position without undue interruption. Thus, it does not appear that the AJ ignored the position description. Moreover, a comparison of Devaney's memorandum outlining his reasons for not selecting Chudson with the thirteen "major duties and responsibilities" defined in the position description shows that there were no substantive differences between the qualifications "deemed necessary by Mr. Devaney" and those listed in the position description. We therefore reject Chudson's contention that the board required him to possess qualifications beyond those listed in the position description.

Chudson further argues that the AJ's finding that the position was not a standard desk officer position lacks support in the record. We disagree. Devaney testified concerning the special duties of the position; he also stated that previous position descriptions for "supervisory Criminal Investigator" positions did not encompass all the requisite qualifications of the position at issue. Thus, the AJ's finding is supported by substantial evidence.

Chudson also contends that the AJ erred in finding "that Mr. Sheehan's testimony was not relevant." In fact, the AJ made no such finding. The AJ did not ignore Sheehan's expert testimony or fail to resolve the conflict between Sheehan's testimony and

Devaney's testimony, as Chudson alleges. Rather, the AJ found that Sheehan "provided no evidence that (Chudson) had supervisory experience in other than a brief acting capacity, or that he had . . . policy-making, budget, systems management, personnel, or training experience . . . ." In other words, the AJ determined that Sheehan's testimony failed to rebut the EPA's showing that hiring Chudson would have caused the agency an undue interruption. Chudson has not Persuaded us that the AC's weighing of the testimony was in error or that her finding is unsupported by substantial evidence.

Chudson challenges the AJ's refusal to permit depositions of West and Kern and her cutting off certain lines of questioning during the hearing. It is well-established that "[p]rocedural matters relative to discovery and evidentiary issues fall within the sound discretion of the board and its officials." Curtin v. Office of Personnel Management, 846 F.2d 1373, 1378 (Fed. Cir. 1988) . Having carefully reviewed the record, we discern no abuse of discretion by the AJ either in refusing to permit depositions of West and Kern or in limiting testimony in the remand proceeding to relevant issues.

Finally, Chudson suggests that he was more qualified for the position than the individual selected by the EPA, pointing to the "debatable qualifications of the candidate who was selected." Whether or not the contention is true, it ignores the fact that the only issue on appeal is whether Chudson's selection would have caused an undue interruption to the EPA. Chudson has not cited any authority for the proposition that the selected individual's qualifications are relevant to this inquiry. We therefore find the argument unpersuasive.

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United States Court of Appeals for the Federal Circuit

95-3135

JONATHAN W. CHUDSON,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

NEWMAN, Circuit Judge, dissenting.

I respectfully dissent. Mr. Chudson, in settlement of his whistleblower complaint against the Environmental Protection Agency EPA), was given two years of placement on EPA's Reemployment Priority List. During that period a position for which he was *qualified* arose. Without posting the position the Director of the office arranged for the transfer of a former colleague, Mr. Catlett, from another agency. Then, upon intervention of a personnel officer Mr. Chudson was told of the position; he applied, was interviewed, and was rejected. The Director, Mr. Devaney, when pressed, gave the only reason permitted by the reemployment priority regulations, 5 C.F.R.

§330.201, viz. that Mr. Chudson's hiring would cause an "undue interruption" to the agency.

From a review of the hearing testimony, it appears that Mr. Chudson had the qualifications that were stated in the position description. Mr. Chudson is described as having "six years of [the same] agency experience in the same grade and series." Although the panel majority now holds that the agency can impose additional requirements, as the administrative judge held, the Office of Criminal Enforcement Director Devaney testified that the position description did describe the position. Indeed, a position description can not be changed sub silentio.

The majority states that it is not relevant whether the person who was personally selected (Mr. Catlett) had superior or even equal qualifications. However, when the reason for denying the statutory priority is "undue interruption," mere must at least be a showing that the selected candidate would not cause the same interruption. To hold otherwise is to convert the "priority" status into a sham.

The panel majority refers to Mr. Chudson's suggestion that he was more qualified than Mr. Catlett for the position. The administrative judge would not permit any questioning on the issue of Mr. Catlett's suitability for the position or whether his appointment would cause more or less "interruption" to the agency than Mr. Chudson's. Yet without such testimony the administrative judge could not have accurately determined whether Mr. Chudson's non-selection was legitimately motivated to avoid "undue interruption," or a sham to ratify the selection of Mr. Catlett.

The administrative judge's refusal to permit the requested witnesses to testify at the first trial, and the inappropriately rigorous restraints on testimony on remand, do not leave an impression of fairness in the administrative process. I would reverse the Board's ruling.

APPENDIX B

United States Court of Appeals for the Federal Circuit

95-3135

JONATHAN W. CHUDSON,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ORDER

Before ARCHER, Chief Judge, NEWMAN, and LOURIE, Circuit Judges.

A petition for rehearing having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT,

UPON CONSIDERATIONN THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of this court will issue on September 15, 1995.

FOR THE COURT
FRANCIS X. GINDHART, CLERK

Dated: September 8, 1995

by /s/
Diane M. Fry, Chief Deputy Clerk

APPENDIX C

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JONATHAN W. CHUDSON,
Appellant,

DOCKET NUMBER
DC0330920437-I-1

v.

DATE: OCT 27 1994

ENVIRONMENTAL PROTECTION AGENCY,
Agency.

Thomas M. Devine, Esquire, Government Accountability Project, Washington, D.C., for the appellant.
Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Jessica L. Parks, Vice Chairman
Antonio C. Amador

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 27, 1994, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113 (b).

APPENDIX D

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JONATHAN W. CHUDSON,
Appellant,

DOCKET NUMBER
DC-0330-92-0437-M-1

v.

DATE: JUN 27 1994

ENVIRONMENTAL PROTECTION AGENCY,
Agency.

Thomas M. Devine, Esquire, Government Accountability Project, Washington, D.C., for the appellant.

Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE
Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

The appellant filed an appeal alleging that the agency failed to select him for the position of Supervisory Criminal Investigator, GM-1811-14, Office of Enforcement, Office of

Criminal Enforcement, in violation of his reemployment priority rights. *See* 5 C. F. R. S 330.209. In an initial decision that became a final decision of the Board when the appellant's petition for review was denied, the agency selection action was AFFIRMED. *Chudson v. Environmental Protection* Agency, MSPB Docket No. DC-0330-92-0437-I-1 (Initial Decision, June 17, 1992). The United States Court of Appeals for the Federal Circuit VACATED the decision and REMANDED the case to the Board for further proceedings. *Chudson v. Environmental Protection Agency,*
No. 93-3085 (Fed. Cir. Feb. 22, 1994). For the following reasons, the action is again AFFIRMED.

John W. West

The court held that the testimony of John W. West, Acting Director of the agency's Criminal Investigation Division at the time of the appellant's nonselection, was improperly excluded. Id. slip of. at 7. Mr. West was offered by the appellant to testify "regarding the timing and circumstances of his request for the lateral transfer of someone other than [Chudson] to the ... position in question and specifically that he requested this action prior to the interview of [Chudson] for the same position." *Id.*

In his testimony, Mr. West explained that his official position at the time of the appellant's nonselection was Special Agent in Charge of Investigations. The position of Director, Criminal Investigation Division, was vacant, and the deputy director was assigned as the acting director. Mr. West speculated that on January 3, 1992, the day he signed the standard form 52, Request for Personnel Action, recruiting for the Supervisory

Criminal Investigator position, and the related position description, the deputy director must have been out of the office and he was temporarily filling in for him. Transcript at 59, 62.

Mr. West testified that he had no role in the preparation of the documents he signed nor was he responsible for their contents. According to Mr. West, he signed the documents only because they were presented to him as forms that were necessary for the recruitment action begun by Earl Devaney. Transcript at 63 - 66. Mr. West first learned of the recruitment action from Mr. Devaney around the time the forms were signed. He did not know James M. Catlett prior to his entry on duty, and he did not know the appellant's name was on the reemployment priority list at the time he signed the forms. Transcript at 71, 74, 77. Mr. West, I conclude, offered no testimony relevant to the "timing and circumstances of his request for the lateral transfer of someone other than [Chudson]."

Zandra I. Kern

The court held that the testimony of Zandra I. Kern, Team Leader of the agency's Headquarters Operations and Client Services Division, at the time of the appellant's nonselection, was improperly excluded. *Id.* Ms. Kern was offered by the appellant to testify regarding her role as the personnel officer at the time of Chudson's nonselection and 'the guidance that she gave the Earl Devaney ... regarding how Devaney could avoid hiring [Chudson].'" Id.

Ms. Kern testified that she did not classify the Supervisory

Criminal Investigator position, did not review Mr. Catlett's qualifications, and did not contact his employing agency for background information or a release date. Transcript at 11 - 13. Based on her experience as a personnelist, however, she found nothing unusual about the steps taken to accomplish these actions in the selection of Mr. Catlett. Transcript at 14 - 18, 52 - 54.

Ms. Kern testified that during the course of her discussions with Mr. Devaney concerning the proposed reorganization, she learned that he had a grade 14 position to be filled. At that time, she told him that there was someone on the reemployment priority list that he would need to consider before he could fill the job from outside the agency. Transcript at 30. She advised him that she would refer the candidate on a merit promotion certificate. If, after a review of the candidate's qualifications, he felt that the candidate was not qualified, he would have to explain his reasons for that belief to her in writing. If he believed the candidate was a good candidate, he could select him from the certificate and return the certificate to her. Transcript at 31 - 33. Ms. Kern denied that Mr. Devaney ever told her that Mr. Catlett was a candidate for the position. She learned about Mr. Catlett, she said, after Mr. Devaney declined to select the appellant from the reemployment priority list. Transcript at 30.

Because Ms. Kern did not personally take any of the steps that were necessary to hire Mr. Catlett, her role as personnel officer at the time of his selection was limited to her discussions with Mr. Devaney concerning the proposed reorganization and the need to consider the reemployment priority list candidate. Ms. Kern correctly advised Mr. Devaney of the actions he could

take to select or not to select the appellant from the reemployment priority list. She is not shown to have provided any advice concerning how he could avoid selecting the appellant. Ms. Kern, I conclude, offered no testimony relevant to "illegal preselection."

Thomas T. Sheehan

The court held that the testimony of Thomas T. Sheehan, Assistant Inspector General for Investigations at the Department of the Interior, was improperly excluded. Id. slip of. at 8 - 9. Mr. Sheehan was offered by the appellant to testify "regarding the hiring, training, and qualifications of Federal supervisory criminal investigators" and, specifically that "based on [Chudson's] qualifications and the job for which he was considered, there would not have been 'undue interruption' to the agency if [Chudson] had been placed in the GM-14 position in question." *Id.* at 8. Mr. Sheehan was called to rebut the earlier testimony of Mr. Devaney concerning the position qualifications and the reasons why the appellant's selection would have been an undue interruption. *Id.* at 9.

Mr. Devaney testified that the incumbent of the Supervisory Criminal Investigator position would be required to oversee the hiring and training of anticipated new staff, oversee the corresponding expansion of the budget, and develop and implement criminal enforcement training for federal, state, and local governments. He would be required to formulate and implement broad national criminal investigative policies and procedures and serve as principal criminal enforcement liaison with other law enforcement personnel. Mr. Devaney concluded

that the appellant could not assume these responsibilities without undue interruption in particular because he had no supervisory experience; had experience in formulating policy only as related to computer policies; had no significant budget experience; had no experience in maintaining a system of accountability for space and equipment; had no experience in developing a performance evaluation system, recruiting or training staff, or providing oversight to national training programs. The appellant's own testimony did not significantly contradict that of Mr. Devaney. *See Chudson v. Environmental Protection Agency,* MSPB Docket No. DC-0330-92-0437-I-1 slip of. at 5 - 6.

Mr. Sheehan testified that the position description in issue appeared to be a "standard desk officer sort of position" and that all such positions require the ability to conduct a complex investigation. Transcript at 95, 100. The appellant, he said, was uniquely qualified for the position because of his background in accounting and computer operations, because of his demonstrated ability to lead small teams, and because of the high quality of the work the appellant had performed for him. Transcript at 103, 113, 124.

As an initial matter, Mr. Sheehan's perception of the position qualifications ignored the fact that the position was not shown to be, as he said, a "standard desk officer position." In fact, the position had been established pursuant to recent legislation which authorized an expansion of staff and enhanced responsibilities. While knowledge of complex investigations doubtless was an important qualification, Mr. Sheehan failed to recognize that the position required strong supervisory, budget, and policy-making abilities that would enable the agency to meet

its responsibilities under a new congressionally mandated program.

Given these position qualifications, nothing in Mr. Sheehan's testimony contradicted Mr. Devaney's prior testimony that the appellant did not have the background and experience necessary to perform the duties of the position without undue interruption. Mr. Sheehan provided no evidence that the appellant had supervisory experience in other than a brief acting capacity, or that he had the policy-making, budget, systems management, personnel, or training experience deemed necessary by Mr. Devaney. Mr. Sheehan provided no persuasive evidence that the background and experience sought by Mr. Devaney for the incumbent of the Supervisory Criminal Investigator should not have been necessary. Mr. Sheehan, I conclude, did not rebut the testimony of Mr. Devaney that the appellant's selection would have been an undue interruption.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/
Elizabeth B. Bogle
Administrative Judge

APPENDIX E

United States Court Of Appeals For The Federal Circuit
93-3085

JONATHAN W. CHUDSON,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Thomas M. Devine, Legal Director, Government Accountability Project, of Washington, D.C., argued for petitioner.

Sheryl L. Floyd, Senior Trial Counsel, Commercial Litigation Branch, Department of Justice, of Washington, D.C., argued for respondent. With her on the brief were Frank W. Hunger, Assistant Attorney General and David M. Cohen, Director. Also on the brief was David P. Guerrero, Office of General Counsel, Environmental Protection Agency, of Washington, D.C. Of counsel was Joanne M. Hogan, Environmental Protection Agency.

Appealed from: Merit Systems Protection Board

DECIDED: February 22, 1994

Before NEWMAN, ARCHER, and LOURIE, Circuit Judges.
ARCHER, Circuit Judge.

DECISION

Jonathan W. Chudson petitions for review of the June 17, 1992 initial decision (No. DC0330920437-I-1) of the Merit Systems Protection Board (board) sustaining the action of the Environmental Protection Agency (EPA or agency) in not selecting Chudson from the Reemployment Priority List for the newly created position of Supervisory Criminal Investigator. The initial decision of the board became final on November 2, 1992 when the board denied review. We vacate and remand.

DISCUSSION

I.

Chudson was employed at EPA until October 3, 1990, when he was separated from the agency by the terms of a confidential settlement agreement. Pursuant to this settlement and 5 C.F.R. § 330.201, Chudson was placed on the agency's Reemployment Priority List (RPL).

In October 1991, Earl E. Devaney, formerly an employee at the Department of Treasury, was appointed Director of the Office of Criminal Enforcement at EPA. As Director, Devaney was charged with overseeing all of the criminal enforcement activities for EPA. Devaney had approval to create the position of Supervisory Criminal Investigator. In December 1991, he asked a former colleague at Treasury, James M. Catlett, if he would be interested in the position. In January of 1992, the GM-14 position was formally established and Catlett, who was already a Supervisory Criminal Investigator at

Treasury, submitted the formal paperwork to Devaney to apply for the position. Devaney then sent the paperwork to the EPA personnel office in order to arrange for Catlett's transfer.

The EPA personnel office informed Devaney that Catlett's transfer could not be processed because there was a candidate, Chudson, on the RPL who must be considered for the position. Devaney obtained Chudson's Application for Federal Employment, form SF-171, and interviewed him on January 28, 1992. Chudson presented an updated SF-171 and letters of recommendation at the interview.

Following the interview, Devaney prepared a memorandum to the personnel department explaining the reasons why the selection of Chudson for the position would present an "undue interruption" to the Office of Criminal Enforcement and the agency. Catlett was then hired and a letter was sent to Chudson explaining that he was not selected for the position because of his "lack of experience in management, oversight of training, and development and implementation of broad national criminal investigative policies." Chudson appealed the agency's decision to the board on the grounds that the failure to select him was a violation of his reemployment priority rights and that the agency action had been conducted in reprisal for protected whistleblowing activity.

The board affirmed EPA's decision. The board found that EPA established that Chudson's selection would have caused an "undue interruption" within the meaning of 5 C.F.R. § 330.207(d) and that Chudson failed to prove EPA's action was

taken in reprisal for Chudson's whistleblowing activity. Chudson timely appealed the decision of the board.

II.

Under the narrow standard of review granted this court by statute, a decision of the board must be affirmed unless it is determined to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law, obtained without procedures required by law, rule, or regulation having been followed, or if the decision is unsupported by substantial evidence. 5 U.S.C. § 7703(c) (1988).

Chudson argues, as he did before the board, that the "undue interruption" exception to the rule that those on the RPL will be considered for open positions does not apply to vacant positions. We do not agree that the RPL regulations, 5 C.F.R. § § 330.201-.209, preclude applying this exception to vacant positions.

Section 330.201(a) requires an agency "to establish and maintain a reemployment priority list (RPL) for each commuting area in which it separates eligible employees due to reduction in force or compensable injury . . . ." 5 C.F.R. § 330.201(a) (1993). Employees eligible to be placed on the RPL include employees separated from employment due to a reduction in force (RIF) (i.e., employees who have not been placed in another position pursuant to the RIF rules)[1], see 5 C.F.R.

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[1] If there are no available positions for which the separated employee is either qualified or eligible, the employee is then eligible to be

§ 330.203, and employees separated because of a compensable injury or disability, see 5 C.F.R. § 330.204. For an employee who has been separated due to a RIF, the RPL regulations provide that the employee is "entitled to consideration for positions . . . for which [the employee is] qualified and available that are at no higher grade (or equivalent) and have no greater promotion potential than the position from which the employee was . . . separated." 5 C.F.R. § 330.206(a)(1) (1993). If there is a qualified employee on the RPL, an agency may appoint an individual who is not on the RPL "only when necessary to obtain an employee for duties that cannot be taken over without undue interruption to the agency by an individual who is on the RPL or has higher standing [on the RPL] than the one appointed." 5 C.F.R. § 330.207(d) (1993) (emphasis added).

Chudson argues that the "undue interruption" exception is inapplicable to vacant positions, like the Supervisory Criminal Investigator position established by Devaney, because the agency would normally expect an interruption in the assigned functions of the position due to the vacancy. In these circumstances Chudson says there can be no interruption that is "undue." This is particularly true, Chudson argues, when the position is newly created because there can be no "interruption" when performance of the position has never started. Chudson concludes that the "undue interruption" exception should not apply here because the Supervisory Criminal Investigator

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entered on the RPL and placement is then governed by the RPL regulations. See generally Carey v. Merit Systems Protection Board, 768 F.2d 1338 (Fed. Cir. 1985); Horner v. Department of the Navy, 41 M.S.P.R. 20 (1989).

position was newly created and vacant. Thus, there can be no ongoing activities to interrupt.

In support of his argument, Chudson cites a line of board cases holding that the "undue interruption" provision recited in the RIF regulations is applicable only to the exercise of RIF assignment rights involving displacement, not to the filling of vacant positions. See, e.g., Jamison v. Department of Transportation, 20 M.S.P.R. 513, 516-17 (1984). The RIF regulations, 5 C.F.R. Part 351, provide that an employee who is released from their position due to a RIF may be qualified for reassignment to a new position if, inter alia, the employee "[c]learly demonstrates on the basis of overall background, including recency of experience, a positive ability to successfully perform all critical elements of the specific position upon entry into it, without undue interruption to that activity and without any loss of productivity beyond that normally expected in the orientation of any new but fully qualified employee." 5 C.F.R. § 351.702(a)(4) (1993) (emphasis added). Jamison and its progeny[2] have held that the RIF "undue interruption" provision does not apply when filling a vacant provision.[3] Chudson

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See, e.g., Lewellen v. Department of the Air Force, 25 M.S.P.R. 525, 527 (1985); Mazzola v. Department of Labor, 25 M.S.P.R. 682, 686 (1985).

3

Jamison did not interpret the present RIF regulations, but rather interpreted the regulations as they read in 1983, which stated an employee was qualified if the employee "[has the capacity adaptability, and any special skills needed to satisfactorily perform the duties and responsibilities of the

contends the RIF "undue interruption" provision as interpreted by Jamison applies as well to RPL actions because the chapter on RPL rules in the Office of Personnel Management's (OPM) Federal Personnel Manual (FPM) defines "undue interruption" by a cross-reference to the RIF chapter. See Federal Personnel Manual, ch. 330, subch. 1, § 1-14 (1991).

We disagree with Chudson's interpretation of the RPL regulations. Nowhere in the regulations does it say the "undue interruption" exception does not apply to vacant positions. Indeed, as noted by the board, such an interpretation in the context of RPL actions would nullify the entire exception because the RPL is used exclusively for filling vacant positions. There would be no reason to include the undue interruption exception in the RPL regulations if the exception could never apply.

Chudson's argument regarding the Jamison case is also unpersuasive. First, the board decision in that case is not binding on this court. Second, that case involved interpretation of the RIF regulations, not the RPL regulations. OPM may have incorporated the definition of the "undue interruption" from the

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position without undue interruption to the activity." 5 C.F.R. § 351.701(a)(4) (1983). The RIF regulations were amended in late 1983. The amendments moved the provisions regarding qualifications for assignment rights from subsection 701 to subsection 702 and amended the language as set out in the text of the opinion. The Office of Personnel Management (OPM) stated it made the changes "to assure that employees are fully qualified to do the job into which they bump or retreat." 48 Fed. Reg. 49463 (1983).

RIF chapter[4] in the FPM, but this does not mean it adopted the board's decisions as to when this definition applies.

Finally, Chudson's argument gives no recognition to the fact that a vacant position may have important agency functions assigned to it. Similarly, a position that is vacant because it is newly created may also encompass important activities as in this case where certain functions formerly performed in a regional office had been reassigned to the newly created Supervisory Criminal Investigator position in the Washington D.C. headquarters. An undue interruption to the agency may well occur if the performance of important functions of a vacant position (including newly created position) would be delayed

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[4] FPM Supplement 351-1, chapter S2-1v (1989) provides:

> Undue interruption means a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality, taking into account the pressures of priorities, deadlines, and other demands. A work program probably would be unduly interrupted if an employee needed more than 90 days after the reduction in force to successfully perform the critical elements of a position. Assignments to lower priority programs or vacant positions might tolerate a longer interruption.

because of deficiencies in the skills of an RPL candidate as compared to a more qualified candidate not on the list.

We are, therefore, convinced that the board properly interpreted the RPL regulations in holding that the "undue interruption" exception in 5 C.F.R. § 330.207(d) applies in RPL actions with respect to vacant (including newly created) positions.[5]

III.

Chudson also argues that the administrative judge (AJ) improperly excluded nine of his witnesses. We review the board's decision to exclude witnesses under an abuse of discretion standard. Davis v. Office of Personnel Management, 918 F.2d 944, 946 (Fed. Cir. 1990).[6]

Among the nine excluded witnesses were John W. West, the Acting Director of the Criminal Investigation Division of the EPA at the time of Mr. Chudson's non-selection, and Zandra I. Kern, Team Leader of the Headquarters Operations and Client Services Division of EPA. West was offered to testify "regarding the timing and circumstances of his request for the

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[5] Because this case involves the interpretation of the "undue interruption" exception of the RPL regulations, 5 C.F.R. § 330.207(d), we express no opinion as to the correctness of Jamison's application of that term in the context of the RIF regulations, 5 C.F.R. § 351.701(a)(4) (1983).

lateral transfer of someone other than [Chudson] to the . . . position in question and specifically that he requested this action prior to the interview of [Chudson] for the same position." Kern was offered to testify regarding her role as the personnel officer at the time of Chudson's non-selection and "the guidance that she gave to Earl Devaney . . . regarding how Devaney could avoid hiring [Chudson]." Chudson offered both witnesses to establish that the agency's undue interruption determination was a "ruse to cover-up the illegal preselection" of Catlett for the position in question.

Chudson's claim of a "ruse" or sham selection process may not be without foundation. He alleges that he met the minimum qualifications for the position and that he was, in fact, more qualified than Catlett in some respects because Chudson was familiar with EPA law. There is no dispute that Devaney and Catlett were colleagues at Treasury and there is no evidence that Devaney considered any candidate other than Catlett until he was required by regulation to consider Chudson. In fact, Devaney discussed the position with Catlett before it had even been formally established. Therefore, there is a colorable basis for Chudson's contention that Catlett had been preselected by Devaney and that Devaney had given Chudson only a perfunctory interview in order to comply with agency rules with no intention of ever considering him for the position. West and Kern both had personal knowledge of the selection process at issue as a result of their direct participation and their testimony would be relevant. Under these circumstances, Chudson should have been permitted to elicit the testimony of these witnesses in an effort to support his contention. We are convinced that the AJ abused her discretion in excluding these witnesses.

Another one of the nine witnesses excluded by the AJ was Thomas T. Sheehan, the Assistant Inspector General for Investigations of the Department of the Interior. Sheehan was offered by Chudson as an expert witness "regarding the hiring, training, and qualifications of Federal supervisory criminal investigators" and, specifically, his testimony was expected to prove that "based on [Chudson's] qualifications and the job for which he was considered for [sic], there would not have been 'undue interruption' to the agency if [Chudson] had been placed in the GM-14 position in question." Chudson argued to the AJ that Sheehan's testimony was necessary to "refute the expected testimony of agency witness Earl Devaney, the selecting official, regarding the lack of qualifications of [Chudson] for the position in question." We agree with Chudson that Sheehan's testimony should have been admitted.

Sheehan's experience would clearly qualify him as an expert with respect to the hiring, training and qualifications for the position of "Supervisory Criminal Investigator" at his agency, the Department of the Interior. While the criteria for the position of the same name at EPA are somewhat different, the record demonstrates the positions are not so different as to render Sheehan's testimony irrelevant. The title "Supervisory Criminal Investigator" is used at agencies other than EPA for similar positions; Catlett, for example, was a Supervisory Criminal Investigator at Treasury at the time he was under consideration for the position at issue. Furthermore, the fact that EPA chose to go outside the agency to fill the position tends to establish that the requirements of the position are not unique to EPA. Thus Sheehan's testimony is at least relevant to

the issue of the qualifications required of a "Supervisory Criminal Investigator."

While the relevancy of Sheehan's testimony alone does not warrant its admission, other circumstances in this case persuade us his testimony should have been admitted. Devaney, the person who both created and filled the position at issue, was EPA's witness on both the position qualifications and the reasons why Chudson's selection would have been an "undue interruption" to the agency. As discussed above, Chudson had a colorable basis to suspect that Devaney was biased in favor of hiring Catlett. Yet the only testimony permitted by the AJ in rebuttal of Devaney was Chudson's own testimony. The result was to make Devaney's testimony on the position requirements, and in turn on whether a person of Chudson's qualifications would cause an undue interruption, virtually unassailable. In foreseeing this result, Chudson offered the testimony of Sheehan. Accordingly, on the facts of this case, we conclude the AJ abused her discretion in excluding the testimony of Sheehan.

In summary, we conclude that the AJ properly interpreted the RPL regulations, including the "undue interruption" exception, but that the AJ improperly excluded the testimony of witnesses West, Kern, and Sheehan. This case is remanded to the board for further proceedings in accordance with this decision.[7]

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[7] We have considered Chudson's appeal of the AJ's determination that Chudson failed to prove that the EPA's action was taken in reprisal of

No costs.

VACATED and REMANDED

Chudson's whistleblowing activity, as well as his other bases for appeal, and do not find that they have merit.

APPENDIX F

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JONATHAN W. CHUDSON,
Appellant,

DOCKET NUMBER
DC033092043711

v.

DATE: OCT 27 1994

ENVIRONMENTAL PROTECTION AGENCY,
Agency.

Francine K. Weiss, Esquire, Kalijarvi & Chuzi, P.C., for the appellant.
Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman
Antonio C. Amador, Vice Chairman
Jessica L. Parks, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on June 17, 1992, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113 (b).

APPENDIX G

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

JONATHAN W. CHUDSON,
Appellant,

DOCKET NUMBER
DC0330920437-I-1

v.

ENVIRONMENTAL PROTECTION AGENCY,
Agency.

Francine K. Weiss, Esquire, Kalijarvi & Chuzi, P.C., Washington, D.C., for the appellant.

Joanne M. Hogan, Esquire, Washington, D.C., for the agency.

BEFORE

Elizabeth B. Bogle
Administrative Judge

INITIAL DECISION

The appellant filed an appeal alleging that the agency failed to select him for the position of Supervisory Criminal

Investigator, GM-1811-14, Office of Enforcement, Office of Criminal Enforcement, in violation of his reemployment priority rights. The appeal was timely filed and within the jurisdiction of the Board. *See* 5 C.F.R. S 330.209. For the following reasons, the agency action is AFFIRMED.

Background

The appellant's 1989 reduction in grade was resolved by settlement agreement. *See Chudson* v. *Environmental Protection Agency,* MSPB Docket No. DC04328910477 (Initial Decision, September 28, 1989). Pursuant to the agreement, the appellant was restored to a position at his original grade level f or a period of one year. At the conclusion of the year, the position was abolished and the appellant was separated by reduction in force. The agreement provided that the appellant "retains his right to reemployment with the Federal government in accordance with 5 C.F.R. Part 330, except that [a]ppellant waives his right to reemployment with the [Environmental Protection Agency Office of Inspector General]." See agreement at 7(5). Pursuant to the agreement and applicable regulations, the appellant's name was entered on the agency reemployment priority list for a two year period beginning on or about October 3, 1990. *See* 5 C.F.R. § 330.203(c); Zandra I. Kern affidavit.

In October of 1991, Earl E. Devaney was appointed Director of the Office of Criminal Enforcement. At the time of his appointment, Mr. Devaney was serving as Special Agent in Charge of the Fraud Division of the U.S. Secret Service, Department of the Treasury. The mission of the Office of Criminal Enforcement was to investigate environmental crime.

At the time of Mr. Devaney's appointment, the office was being restructured and expanded. Pursuant to the Pollution Prosecution Act, the mission of the office was enhanced and the staffing level was scheduled to increase dramatically over the next few years. The office included two divisions, one staffed by criminal attorneys and the other by criminal investigators, each supervised by a division director who reported to Mr. Devaney. *See* testimony of Earl E. Devaney.

Mr. Devaney had approval to establish the position of supervisory Criminal Investigator, GM-1811-14, in the Office of criminal Enforcement. This was a new position created from duties that had been contained in other position descriptions. In December of 1991, he discussed the position with James M. Catlett, a Supervisory Criminal Investigator, GM-1811-14, with the Department of the Treasury's Bureau of Alcohol, Tobacco, and Firearms. After the position was officially established in early January of 1992, Mr. Devaney obtained Mr. Catlett's standard form 171, application for Federal employment, and discussed the position with him again. Thereafter, he sent a standard form 52, request for personnel action, to the personnel office to process the transfer of Mr. Catlett to the position. At that time, the personnel office informed him that the action could not be processed because there was a candidate on the reemployment priority list.

Mr. Devaney obtained the appellant's standard form 171 and interviewed him on January 28, 1992. Following the interview, he returned the referral certificate to the personnel office without making a selection. Mr. Devaney prepared a memorandum, dated February 3, 1992, in which he explained his

reasons for not selecting the appellant. Mr. Catlett was notified of his selection on February 4, 1992, and he entered on duty effective February 9, 1992. The appellant was notified in a letter dated February 7, 1992, that he was not selected for the position because his "lack of experience in management, oversight of training, and development and implementation of broad national criminal investigative policies . . . would cause undue interruption . . ."

Legal standard

Office of Personnel Management (OPM) regulations provide, in pertinent part, that an employee on the reemployment priority list due to reduction in force, as was the appellant, "is entitled to consideration for positions in the commuting area for which qualified and available that are at no higher grade (or equivalent) and have no greater promotion potential than the position from which the employee was . . separated." 5 C.F.R. § 330.206(a)(1) . The regulatory requirement for the agency to adopt a method for ranking individuals on the list is not applicable here because the appellant was the only listed individual. The regulations allow an agency to make an exception and appoint an individual who was not on the list "only when necessary to obtain an employee for duties that cannot be taken over without undue interruption to the agency by an individual who is on the [list]."

OPM regulations at part 330 do not define "undue interruption." That term is also used in OPM's reduction-in-force regulations, see 351.702(a)(4), and is defined in the Federal Personnel Manual (FPM) guidance on reduction in

force. FPM Chapter 330, Reemployment Priority List, refers to that guidance as a cross reference. *See* FPM chapter 330, Subchapter 1-14. There, undue interruption is defined as:

> . . . a degree of interruption that would prevent the completion of required work within the allowable limits of time and quality, taking into account the pressures of priorities, deadlines, and other demands. A work program probably would be unduly interrupted if an employee needed more than 90 days after the reduction in force to successfully perform the critical elements of a position. Assignment to lower priority programs or vacant positions might tolerate a longer interruption.

Federal Personnel Manual Supplement 351-1, Chapter S2-lv.

Citing *Jamison v. Department of Transportation,* 20 M.S.P.R. 513, 516-17 (1984), the appellant argued that because the Board has held the undue interruption test inapplicable to the filling of a vacant position and because the supervisory criminal Investigator position in issue was a vacant and newly created position, the agency may not invoke the undue interruption exception to his selection from reemployment priority list. As the agency correctly pointed out, however, the reemployment priority list is used exclusively for selections for vacant positions. Reliance on *Jamison* would therefore render the undue interruption test contained in part 330 meaningless. Because that test is contained in OPM regulations, I find that it may be invoked by an agency making a selection for a vacant position, and, in the absence of any evidence of a different

definition, the definition at FPM Supplement 351-1, Chapter S2-1v applies.

The agency, I conclude, must show that it made an exception to selection from the reemployment priority list to obtain an employee for duties that could not have been taken over by the appellant without undue interruption to the agency as defined by FPM Supplement 351-1, Chapter S2-lv. The exception may not be based on a showing that the individual with priority is not as well qualified as someone else. See FPM Chapter 330, Subchapter 1-8d.

The appellant's selection would have caused undue interruption.

Mr. Devaney testified that the restructuring of the Office of Criminal Enforcement involved, the consolidation of two offices. Investigator and administrative support positions which had been located in Colorado were transferred to the Office of Criminal Enforcement in Washington, D.C. The staff of the Office of Criminal Enforcement thereafter included both criminal investigators and criminal attorneys. According to Mr. Devaney, he would have established the Supervisory criminal Investigator position based only on this consolidation of offices. An additional need for the position arose because the Pollution Prosecution Act enhanced and expanded the mission of the office and will result in a "quadrupling" of staff by 1995. According to Mr. Devaney, this increase in staff must be accomplished within specific time frames.

In his February 3, 1992, memorandum and his testimony, Mr. Devaney stated that the incumbent of the Supervisory

Criminal Investigator position was required to oversee the hiring and training of this anticipated new staff, oversee the corresponding expansion of the budget, and develop and implement criminal enforcement training for federal, state, and local governments. He was required to formulate and implement broad national criminal investigative policies and procedures and serve as principal criminal enforcement liaison with other law enforcement personnel. Based on the appellant's background and experience as reflected on his standard form 171 and discussed during the interview, Mr. Devaney concluded that "the learning curve that would be necessary [for the appellant] to perform in the job would be at least a year or two." In particular, Mr. Devaney pointed out in his testimony that the appellant had no supervisory experience; had experience in formulating policy only as related to computer policies; had no significant budget experience; had no experience in maintaining a system of accountability for space and equipment; had no experience in developing a performance evaluation system, recruiting or training staff, or providing oversight to national training programs. According to Mr. Devaney these latter duties are the essence of the program that the agency is under a congressional mandate to develop.

The appellant's own testimony concerning his background and experience was not in substantial conflict with that of Mr. Devaney. The appellant's only GM-14 level experience was as a Criminal Investigator with the agency's Office of Inspector General. There, he served in a five person office as a desk officer, and while he reviewed the work of investigators in the regions and occasionally served as acting inspector general during brief absences of the inspector general, he had no official

supervisory duties. Similarly, none of the appellant's claimed experience revising chapters of an investigations manual, preparing an office budget submission, and conducting computer training sessions for investigators was shown to be at the level of an agent in charge. Because Mr. Devaney's testimony concerning the limitations of the appellant's background and experience is largely uncontradicted and because there is no evidence to impugn his judgment that with these limitations it would be one or two years before the appellant would be able to perform in the Supervisory Criminal Investigator position, I find that the agency has met its burden of establishing that the appellant's selection would have been an undue interruption.

The appellant's nonselection was not reprisal for his whistleblowing activity

To establish a prima facie case of reprisal for whistleblowing, the appellant must show by preponderant evidence that a disclosure described under 5 U.S.C. § 2302(b)(8)(A) was a contributing factor in his nonselection. *See Gergick v. General Services Administration,* 43 M.S.P.R. 651, 659 (1990); 5 U.S.C. § 1221(e)(1); 5 C.F.R. S 1209.7(a). A contributing factor means any factor which alone or in connection with other factors tends to affect the outcome of the decision. 5 C.F.R. § 1209.4(c). If the disclosure is shown to be a contributing f actor, corrective action may nevertheless not be ordered if the agency establishes by clear and convincing evidence that it would not have selected the appellant even in the absence of his disclosure. 5 U.S.C. § 1221(e)(2); 5 C.F.R. § 1209.7(b).

Whistleblowing is defined as:

> the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.

5 C.F.R. § 1209.4(b). The agency stipulated that the appellant has engaged in whistleblowing activity. The stipulation satisfies the appellant's burden of proof on this element. 5 C.F.R. § 1201.63.

To establish that a protected disclosure was a contributing factor in the agency's action, an appellant must establish that the responsible agency official had actual or constructive knowledge of the disclosures and that a nexus exists between his protected disclosure and the action appealed. *See McDaid v. Department of Housing and Urban Development*, 46 M.S.P.R. 416, 421 (1990).

The appellant was ordered to submit a list of the activities he considered to be his protected disclosures. The list he furnished shows that the last activity took place in the spring of 1991. The record shows that Mr. Devaney, the responsible agency official, was appointed to his position at the Environmental Protection Agency from another agency in October of 1991. Hence, he was not a management official of the agency at the time of the appellant's claimed protective disclosures and would have had no reason to be aware of them. In his testimony, Mr.

Devaney denied an awareness of the appellant's specific disclosures and said he had not spoken to anyone at the agency about them. Pasquale Alberico, acting Director of the office of Criminal Enforcement prior to Mr. Devaney's appointment, also took part in the appellant's interview. Mr. Alberico was not shown to have had any knowledge of the appellant's whistleblowing activity. Mr. Devaney, I conclude, has not been shown to have had any actual knowledge of the appellant's disclosures.

The parties stipulated that Mr. Devaney had constructive knowledge of the appellant's protected disclosures. The stipulation satisfies the first portion of the appellant's burden of proof on this element. 5 C.F.R. § 1201.63.

In addition to proof of constructive knowledge, the appellant must prove that a nexus existed between his protected disclosures and his nonselection for the Supervisory Criminal Investigator position. Mr. Devaney's constructive knowledge of the appellant's protected disclosures appeared to have been based on the appellant's own effort to call them to his attention. According to Mr. Devaney's uncontradicted testimony, his knowledge of the appellant's protected activity was limited to what he read in a letter he received on appellant's behalf from a congressman and the appellant's answer to a question he asked him during the interview. According to Mr. Devaney, the appellant replied to an interview question concerning his experience working with congressional committee staff, a requirement of the Supervisory Criminal Investigator position, by referring Mr. Devaney to a committee staff member who, he said, could answer that question better than he. Because the

record does not establish when Mr. Devaney received the congressman's letter and the only other knowledge Mr. Devaney was shown to have had concerning the protected disclosures was given him by the appellant during the interview and because Mr. Devaney was not employed by the agency at the time the appellant made the disclosures he listed, I conclude that no nexus between Mr. Devaney's constructive knowledge of the appellant's protected disclosures and his nonselection has been established. The appellant has therefore failed to meet his burden to prove that a protected disclosure was a contributing factor in his nonselection.

If the appellant had been able to meet his burden of proof, the agency would be required to establish by clear and convincing evidence that it would not have selected the appellant even in the absence of his disclosures. 5 U.S.C. § 1221(e)(2); 5 C.F.R. § 1209.7(b). Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. 5 C.F.R. § 1209.4(d). Based on my review of the entire record and for the reasons discussed above, I find that the disparity between the appellant's qualifications and experience and the requirements of the supervisory criminal Investigator position in the Office of Criminal Enforcement is shown to be such that the agency could show by clear and convincing evidence that it would not have selected the appellant even in the absence of his disclosures.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

/S/

Elizabeth B. Bogle
Administrative Judge